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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GEORGE LEWIS BAILES, JR.,

Petitioner,

v.

UNITED STATES

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS*

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit corporation established to assist African Americans in securing their constitutional and civil

*The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk.

rights. LDF has on several occasions represented litigants in this Court seeking application of newly enacted legislation to pre-existing claims. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969).

LDF currently represents a number of litigants, including Brenda Patterson,[1] who now seek application of the provisions of the 1991 Civil Rights Act to their pre-Act claims. In that litigation the question presented by petitioner is of substantial importance. In the Eleventh Circuit in the instant case the Department of Justice maintained that *Bradley* remains good law. The United States insisted below that *Bradley* requires application of new legislation to pending claims unless Congress has indicated a contrary intent or such application would be manifestly unjust. In litigation regarding the 1991 Civil Rights Act, however, the Department of Justice has filed briefs

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[1] *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

contending precisely the opposite -- that *Bradley* is bad law and that new legislation should be presumed inapplicable to pre-existing claims.

When Title VII was amended in 1972 to authorize civil actions against federal agencies, the Department of Justice argued in some cases that that legislation *did* apply to pre-Act claims, and simultaneously insisted in other cases that the legislation *did not* apply to pre-Act claims. In that era, as today, government attorneys advanced whichever view of the law worked to their advantage in any given lawsuit, indifferent to the conflict that was inevitably created by that tactic. Acting on petitions filed by LDF, this Court granted certiorari to assure that the same rule of law would apply to all cases. *Brown v. General Services Administration*, 425 U.S. 820, 824 n.4 (1976); *Place v. Weinberger*, 426 U.S. 932 (1976).

REASONS FOR GRANTING THE WRIT

I. There Is A Conflict Among the Circuits Regarding Whether Legislation Should Be Presumed Applicable to Pre-Act Claims

Until four years ago there was no controversy among the lower courts, or within this Court, regarding when new legislation should be applied to pre-Act claims. Since 1974 -- indeed for almost two centuries -- the federal courts had followed the rule articulated in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974):

> [A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

416 U.S. at 711.

> [W]e must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature.

416 U.S. at 715. The lower courts experienced little difficulty or disagreement in applying *Bradley*.

In 1988, the seeds of confusion were sown by this Court's decision in *Bowen v. Georgetown University Hospital*,

488 U.S. 204 (1988). The question in *Bowen* was whether the Administrative Procedure Act authorized the promulgation of regulations which altered after the fact the substantive rights of an affected party. Although that issue was a relatively narrow one, the Court's opinion contained the two potentially more far reaching sentences:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires that result.

488 U.S. at 208.

Two years later, in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 108 L.Ed.2d 842 (1990), the majority opinion set out at length the "manifest injustice" standard in *Bradley*, but also noted the "apparent tension" between *Bradley* and the two sentences quoted above from *Bowen*. 108 L.Ed.2d at 854. Because it believed that the plain language of the statute in *Bonjorno* did not apply to the circumstances of that case, the majority concluded that it "need not in this case ... reconcile the two lines of precedent

represented in Bradley ... and [*Bowen v.*]*Georgetown*...." *Id.* Four members of the Court did address that "apparent conflict," declaring it "more apparent than real" and urging adherence to the holding in *Bradley*. 108 L.Ed.2d at 871 (White, J., dissenting). Justice Scalia, in a separate concurring opinion joined by no other member of the Court, argued that *Bradley* was inconsistent with *Bowen* and should be overruled. 108 L.Ed.2d at 856 - 867.

Bowen and *Bonjorno* have combined to wreak considerable conflict and confusion among the circuit courts. Since *Bonjorno* three circuits have unequivocally reaffirmed their adherence to *Bradley*. In the instant case the Eleventh Circuit held:

> We recognize that there exists some confusion as to the applicability of this *Bradley* analysis.... The Supreme Court has declined to clarify this confusion .... This circuit has relied upon the *Bradley* analysis to determine the retroactive application of statutory changes .... Thus, unless otherwise directed by the United States Supreme Court or the Eleventh Circuit en banc, we are bound by precedent to apply the *Bradley* analysis.

Petition App. A-xvi n.4.[2] On four occasions since *Bowen* the Eleventh Circuit has relied on *Bradley* in holding a new law applicable to a pre-existing claim.[3]

The Seventh Circuit also regards *Bradley* as good and controlling law, reasoning that the concerns expressed in *Bowen* are encompassed within the "manifest injustice" exception to *Bradley* itself:

> Despite the existence of an alternative line of precedent, we believe there is no prejudice in applying only *Bradley* and its progeny to the facts in this case. Any tension between the two lines of precedent is negated because, under *Bradley*, a statute will not be deemed to apply retroactively if it would threaten manifest injustice by disrupting vested rights.

Federal Deposit Ins. Corp. v. Wright, 942 F.2d 1089, 1095 n.6 (7th Cir. 1991), petition for writ of certiorari pending *sub*

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[2] The decision below is now officially reported sub nom. *United States v. Peppertree Apartments*, 942 F.2d 1555 (11th Cir. 1991).

[3] *United States v. Peppertree Apartments*; *Federal Deposit Ins. Corp. v. 232, Inc.*, 920 F.2d 815 (11th Cir. 1991); *Delmay v. Paine Webber*, 872 F.2d 356, 357-58 (11th Cir. 1989); *Campbell v. Dominick & Dominick, Inc.*, 872 F.2d 358, 360-61 (11th Cir. 1984).

nom. Wright v. Federal Deposit Insurance Corp., No. 91-1274.[4] On three occasions since *Bowen* the Seventh Circuit has relied on *Bradley* in holding a new law applicable to a pre-existing claim.[5]

Most recently the Ninth Circuit has reiterated that it continues to apply *Bradley*:

> Where, as here, there is no clear indication of congressional intent, and no "manifest injustice" will result, we conclude that retroactive application ... to pending cases is appropriate. See *Bradley*, 416 U.S. at 711 (court applies the law in effect at the time it renders its decision unless "there is a statutory direction or legislative history to the contrary").

Federal Deposit Ins. Corp. v. New Hampshire Insurance Co., 1991 U.S. App. LEXIS 30071 at *25-*26 (9th Cir. 1991). On six occasions since *Bowen* the Ninth Circuit has relied on

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[4] See also *United States v. Brebner*, 951 F.2d 1017, 1022 (9th Cir. 1991) ("[A] change in the law must be given [retroactive] effect *unless* there was clear indication that it was *not* to apply in pending cases.") (emphasis and bracketed material in original) (quoting *Bradley*.)

[5] *Federal Deposit Ins. Corp. v. Wright*; *Resolution Trust Corp. v. Lightfoot*, 938 F.2d 65, 67 (7th Cir. 1991); *Schalk v. Reilly*, 900 F.2d 1091, 1096-97 (7th Cir. 1990).

Bradley in holding a new law applicable to a pre-existing claim.[6]

On the other hand, in *DeVargas v. Mason & Hanger-Silas Mason Co. Inc.*, 911 F.2d 1377 (10th Cir. 1990), the court stated:

> [W]e simply cannot harmonize ... *Bradley* ... with *Bowen* .... [w]e agree with Justice Scalia's observation in [*Bonjorno*] that "... these two lines of cases are in irreconcilable contradiction." .... Forced to elect between these contradictory presumptions, we choose *Bowen* .... We are strongly persuaded by Justice Scalia's ... concurring opinion in [*Bonjorno*] .... Faced with a choice between ... *Bowen* ... and *Bradley* ... , we elect the presumption reflected in the more recent decision in *Bowen* ....

911 F.2d at 1390, 1392. An Eighth Circuit decision asserted:

> Our cases have noted the irreconcilable conflict in the Court's directions on this point

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[6] *Federal Deposit Ins. Corp. v. New Hampshire Insurance Co.*; *Gonzalez v. Aloha Airlines*, 940 F.2d 1312, 1316 (9th Cir. 1991); *Commonwealth of Northern Mariana Islands v. Kawano*, 917 F.2d 379, 381-82 (9th Cir. 1990); *In re Pacific Far East Lines*, 889 F.2d 242, 247 (9th Cir. 1989); *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989); *Delta Computer Corp., v. Samsung Semiconductor & Telecommun-ications Co.*, 879 F.2d 662, 663-65 (9th Cir. 1989).

> .... [I]n *Kaiser Aluminum & Chemical Corp. v. Bonjorno*.... Justice Scalia criticized the Court for not seizing the opportunity to resolve the real and troubling tension between the *Bradley* and [*Bowen*] lines of precedent .... [O]ne must choose between the *Bradley* and [*Bowen v.*]*Georgetown Hospital* presumptions. The better rule is that of [*Bowen v.*]*Georgetown Hospital.*

Simmons v. Lockhart, 931 F.2d 1226, 1230 (8th Cir. 1991).

A decision in the District of Columbia Circuit commented:

> Recent Supreme Court cases ... have undercut the *Bradley* principle. These decisions appear to be reviving the older presumption *against* retroactively applying statutes .... Because the [*Bowen v.*] *Georgetown Hospital* rule seems more faithful to the older decisions ..., we rely on that rule here.

Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, 963-64 n.6 (D.C.Cir. 1990) (Emphasis in original). And a decision in the Federal Circuit stated:

> There is an irreconcilable conflict between *Bowen* and *Bradley* .... We prefer the longer-standing rule that retroactivity is not presumed.

Sargisson v. United States, 913 F.2d 918, 922-23 (Fed. Cir. 1990.) In briefs filed in the circuit courts within the last month, the Department of Justice, with the approval of the

Solicitor General, has repeatedly characterized these circuits as rejecting *Bradley*,[7] referring to the endorsement of *Bradley* in the instant case with the signal "but see."[8]

Several circuits have struggled to fashion a standard that reconciles *Bradley* and *Bowen*. The First Circuit applies *Bradley* if "[n]o conduct on the part of either party would have differed if the statute had been in effect at the time of the ... incident," but applies *Bowen* if at least one of the

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[7] See, e.g. Brief for the United States as Amicus Curiae, *Davis v. Tri-State Mack Distributions*, Nos. 91-3574, 92-1123 (8th Cir.), p. 13 n.6:

> "Several ... courts of appeals have expressly chosen *Georgetown* over *Bradley*. *See Alpo Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964 n.6 (D.C. Cir. 1990); *Sargisson v. United States*, 913 F.2d 918, 922-23 (Fed. Cir. 1990); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1392 (10th Cir. 1990), *cert. denied*, 111 S.Ct 799 (1991)."

Because the United States was not a party in *Davis*, the government's amicus brief required, and in fact did receive, the approval of the Solicitor General. The brief in *Davis* is dated March 1992. Brief, p. 20.

[8] Brief for the United States of America as Amicus Curiae, *Russell v. City of Houston*, No. 91-6029 (5th Cir.), p. 8 n.5.

parties acted in reliance on the earlier state of the law. *Demars v. First Service Bank For Sav.*, 907 F.2d 1237, 1240 (1st Cir. 1990). The Sixth Circuit applies *Bradley* to laws which are "merely remedial," but applies *Bowen* to statutes which alter "substantive rights and liabilities." *United States v. Murphy*, 937 F.2d 1032, 1037, 1038 (6th Cir. 1991). Decisions in the Fourth and Fifth Circuits cite both *Bradley* and *Bowen* without specifying expressly when each precedent is to be applied. *Walker v. U.S. Dept. of Housing and Urban Dev.*, 912 F.2d 819, 831 (5th Cir. 1990); *Leland v. Federal Ins. Adm'r*, 934 F.2d 524, 528 and n.7 (4th Cir. 1991).

In the court below, the United States contended and the Eleventh Circuit held that new statutes are to be applied to pre-Act claims, unless Congress has clearly directed otherwise or such application would result in "manifest injustice." Whether that is indeed the appropriate canon of construction, i.e. whether *Bradley* is still good law, is a question of great practical importance. Where Congress clearly requires or forbids application of a new law to pre-

Act claims congressional intent is determinative. But Congress frequently does not express its intent on this point. The applicability of a new statute to pre-Act claims thus often turns on which presumption the courts are to utilize: a presumption in favor of such application or a presumption against it. That is a question that could arise regarding virtually any of the hundreds of public laws enacted by Congress each year, and the lower courts have been required to invoke such a presumption in interpreting a large number of statutes involving a wide variety subject matter. A review of Shepard's Citations reveals that the lower courts have in fact relied on *Bradley* on more than 700 occasions. The inter-circuit conflict involved in this case thus concerns a legal issue of pervasive and continuing importance.

II. The United States Is Filing Conflicting Briefs In the Lower Courts, Some Supporting and Others Opposing A Presumption That New Legislation Is Applicable to Pre-Act Claims

In the years after *Bradley* the United States generally and quite frequently maintained in the lower courts that new legislation was presumptively applicable to pre-Act claims.

In 1988 this Court's decision in *Bowen* arguably provided a colorable basis for contending that the courts should utilize precisely the opposite presumption. The United States did not, however, make a principled decision whether to continue to adhere to *Bradley*, as it had in the past, or to repudiate *Bradley* and adopt the contrary rule advocated by Justice Scalia. Rather, government attorneys now enthusiastically support the *Bradley* rule in some cases, while simultaneously disavowing that rule in other litigation. We have lodged with the Clerk of the Court[9] samples of briefs filed by the United States since *Bowen*, some of which argue in favor of, and some of which argue against the rule in *Bradley*. All the briefs cited below were filed by the United States after *Bowen*, and all but one were filed after *Bonjorno*.

In the instant case, for example, the United States insisted, "*Bradley* creates a presumption that statutes will

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[9] For the convenience of the Court, we have lodged an original and nine copies of these sets of briefs.

apply retroactively ...."[10] But the government's position as to the correct presumption has varied from case to case. In briefs filed within the last three years government attorneys have argued:

> The general rule is that statutes are assumed to have only prospective effect unless Congress expressly states otherwise .... The heavy presumption against retroactive application of statutes has deep roots in our law.[11]

> A statute will be presumed to apply to cases pending at the time of its passage unless there is a "clear indication" that it is not to apply. *Bradley* ....[12]

> The general rule of statutory construction is that statutes are presumed to have only prospective effect unless Congress states otherwise.[13]

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[10] Brief of Appellee, *United States v. Peppertree Apartments*, No. 89-7850 (11th Cir.), p. 23.

[11] Brief for the United States as Amicus Curiae, *Davis v. Tri-State Mack Distributions*, Nos. 91-3574, 92-1123 (8th Cir.), pp. 7-8.

[12] Response of the United States to Defendants' Motion to Strike Claims for Damages and Penalties, *United States v. Rent America, Inc.*, No. 89-6188 PAINE (S.D. Fla.), p. 24.

[13] Supplemental Brief for Appellees, *Rowe v. Sullivan*, No. 91-4675 (5th Cir.), p. 12 (capitalization omitted).

> As .... *Bradley* make[s] clear, a statute will be assumed to apply to cases pending at the time of its passage unless there is a "clear indication" that it is not to apply.[14]
>
> Th[e] heavy presumption against retroactivity has deep roots in the law .... The presumption is very strong that a statute was not meant to act retrospectively ....[15]
>
> A fundamental principle of our jurisprudence is that a court will apply the law as it exists when rendering its decision.[16]
>
> In general, statutes are presumed to have only prospective effect unless Congress expressly states otherwise.... This heavy presumption against retroactive application of statutes is deep-rooted.[17]

Bradley and its progeny hold that, in the absence of

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[14] Memorandum of the United States In Opposition to Defendant's Motion to Dismiss, *United States v. Presidio Investments, Ltd.*, No. CIV-90-0063-TUC-ACM (D. Ariz.), p. 14.

[15] Defendant's Memorandum in Opposition to Plaintiff's Motion To File Second Amended Complaint, *Van Meter v. Barr*, Civil Action No. 91-0027 (GAG) (D.D.C.), pp. 6-7.

[16] Brief for Respondent, *Ayala-Chavez v. I.N.S.*, No. 91-70262 (9th Cir.), p. 19.

[17] Brief for the United States of America as Amicus Curiae, *Russell v. City of Houston*, No. 91-6029 (5th Cir.), pp. 6-7.

> clear legislative intent to the contrary, courts should apply the law in effect at the time of the decision.... Even if the legislative history were construed to be ambiguous, the *Bradley* presumption should control.[18]

These contradictory assertions would understandably tend to breed a certain degree of confusion in the lower courts.

The government has taken conflicting positions regarding the correctness and vitality of *Bradley*. In its brief in the instant case, the government referred to *Bradley* twenty-two times.[19] In other litigation, the United States has asserted that "*Bradley* correctly states the law," describing the holding of *Bradley* as "important,"[20] "well-

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[18]Brief of Plaintiff-Appellant Federal Deposit Insurance Corporation, *Federal Deposit Insurance Corp. v. Wright*, No. 90-2217 (7th Cir.), pp. 26-27.

[19]Brief of Appellee, *United States v. Peppertree Apartments*, No. 89-7850 (11th Cir.), pp. 23 (three references), 24 (two references), 25 (four references), 27 (two references), 28 (two references), 30 (three references), 33 (three references), 36 (three references).

[20]Reply Brief of the United States to Opposition Briefs, *United States v. Allied Corp.*, Civil No. C-83-5898 FMS (N.D. Cal.), p. 18.

established,"[21] "well-settled"[22] and a "time-honored principle."[23] In these cases, government attorneys repeatedly quote the holding in *Bradley* that

> a court is to apply the law in effect at the time it renders it decision, unless doing so would result in manifest injustice or there is legislative history to the contrary.[24]

Elsewhere, however, the United States has denigrated *Bradley* and the similar decision in *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), as

> two exceptional Supreme Court decisions that conspicuously depart from the general and longstanding rule against retroactivity .... Nothing in the *Bradley* Court's reasoning compelled the conclusion that its broad language suggests .... ["]It is significant that *not a single one* of the earlier cases

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[21]Response of the United States to Defendants' Motion to Strike Claims For Damages and Penalties, *United States v. Rent America*, No. 89-6188-PAINE (S.D. Fla.), p. 23.

[22]*Id.* at 24.

[23]United States' Reply to Defendants' Oral Motion to Dismiss, *United States v. Cannon*, Civil Action No. 6:91-951-3K (D.S.C.), p. 4.

[24]See, e.g., *id.*, quoting *Bradley v. Richmond School Board*, 416 U.S. at 711.

> cited in *Thorpe* and *Bradley* ... even *purports* to be applying a presumption of retroactivity."[25]

Another recent government brief asserted:

> *Bradley*, as broadly construed, does not survive *Georgetown's* reaffirmation of the presumption against retroactivity.... The venerable lineage and recent affirmation of the *Georgetown* rule strongly suggest that the Supreme Court would conclude that that that rule would govern....[26]

Where the United States has decided to oppose application of a particular new statute to a pre-Act claim, it has repeatedly urged the lower courts to "chose[e] [*Bowen v.*]*Georgetown* over *Bradley*," insisting that "*Georgetown* is the better decision."[27]

The government has also taken contradictory

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[25]Defendant's Memorandum in Opposition to Plaintiff's Motion to File Second Amended Complaint, *Van Meter v. Barr*, Civil Action No. 91-0027 (GAG) (D.D.C.), pp. 14, 16 (emphasis in original) (quoting in part Justice Scalia's concurring opinion in *Bonjorno*).

[26]Brief for the United States of America as Amicus Curiae. *Russell v. City of Houston*, No. 91-6029 (5th Cir.), p. 4, 8.

[27]Brief for the United States as Amicus Curiae, *Davis v. Tri-State Mack Distributions*, Nos. 91-3574, 92-1123 (8th Cir.), p. 13 n.6.

positions regarding the significance of several decisions handed down by this Court after *Bradley* but before *Bowen*. For example, in the instant case petitioner argued in the Eleventh Circuit that a presumption against application of the new legislation was established by *Bennett v. New Jersey*, 470 U.S. 632 (1985). The United States dismissed that contention out of hand:

> The case of *Bennett v. New Jersey* ..., cited by Bailes ... adds nothing to this discussion.... *Bennett* involved a substantive change in an existing statute rather than the creation of a new remedy.... That distinction alone makes *Bennett* irrelevant to the facts here.[28]

Elsewhere, in opposing application of another law that would have augmented the remedy available to prevailing plaintiffs, the United States asserted "the case falls under the traditional rule of nonretroactivity as reaffirmed in *Bennett*...."[29] Similarly, in opposing application of another

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[28]Brief of Appellee, *United States v. Peppertree Apartments*, No. 89-7850 (11th Cir.), p. 31.

[29]Brief for the United States as Amicus Curiae, *Davis v. Tri-State Mack Distributions*, Nos. 91-3574, 92-1123 (8th Cir.), p. 12.

remedial statute, the Department of Justice cited *United States v. Security Industrial Bank*, 459 U.S. 70 (1982):

> "The principle that statutes operate only prospectively ... is familiar to every law student." *United States v. Security Indus. Bank....*[30]

But in yet another recent brief, the Department of Justice took precisely the opposite position regarding the significance of that decision:

> *Security Industrial Bank* ... held that a statute that affects vested property rights will not be given retroactive application. It distinguished its situation from cases where the new statute affects only procedural changes or changes in the form of legal remedy.... Thus, *Security Industrial Bank* is inapposite.[31]

In the court below the Department of Justice insisted in particular, as it had in other cases, that applicability to pre-Act claims was to be presumed where a new law merely altered the remedies or procedure for enforcing a pre-

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[30]Supplemental Brief for the Appellees, *Rowe v. Sullivan*, No. 91-4675 (5th Cir.), p. 13.

[31]Reply of United States to Opposition Briefs, *United States v. Allied Corporation*, Civil No. C-83-5898 FMS (N.D. Cal.), p. 19.

existing right:

> [T]he general rule [is] that "changes relating only to procedure or remedy are usually held immediately applicable to pending cases." .... This is because there is no matured right to *any* particular remedy.[32]

Elsewhere the Department of Justice took the opposite position:

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[32]Brief of Appellee, *United States v. Peppertree Apartments*, No. 89-7850 (11th Cir.), p. 31 (emphasis in original) (citations omitted); *see* also Memorandum of the United States in Opposition to Motion to Dismiss, *United States v. Presidio Investments, Ltd.*, CIV-90-0063-TUC-AM (D. Ariz.), p. 14:

> The 1988 Amendments ... do not create new legal duties or responsibilities. Rather they merely provide a new process by which aggrieved persons may enforce existing rights.... Because the new remedies and enforcement procedures do not affect vested rights, retroactive application is entirely appropriate.

United States' Reply to Defendants' Oral Motion to Dismiss, *United States v. Cannon*, Civil Action No. 6: 91-951-3K, p. 8 ("defendants have no 'right' to avoid new penalties or administrative procedures for conduct that was unlawful at the time it occurred.")

> [T]he supposed substance-procedure distinction is not clearly established.... [A]ny distinction between new substantive and procedural rules would be illusory.[33]

In the court below the Department of Justice insisted that the new double damages statute in this case, which resulted in an additional damage award of over $90,000, ought to be imposed for a pre-Act violation of existing law:

> [T]he double damages remedy does not alter or diminish defendants' substantial rights. [The law] does not prohibit conduct that was previously permitted ... nor does it impose any additional duties...; it merely increases the measure of damages that result from violation of defendants' obligations.[34]

A few weeks after rehearing was denied in this case, however, the Department opposed application of another

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[33]Defendant's Memorandum in Opposition to Plaintiff's Motion to File Second Amended Complaint, *Van Meter v. Barr*, Civil Action No. 91-0027 (GAG) (D.D.C.), pp. 19-20.

[34]Brief of Appellee, *United States v. Peppertree Apartments*, No. 89-7850 (11th Cir.), p. 33.

law that would, if applicable, have resulted in an additional award of a mere $1600 for expert witness fees:[35]

> People take actions based on expectations formed by existing law.... In the present case, ... the ... Act exposes defendants to a new and unexpected liability. To apply the new expert fee provision ... to this case would plainly constitute retroactive application by defeating the defendant's legitimate expectations.[36]

This argument is the precise opposite of the government's stated position in the instant case. Here the government contended below that a defendant who has violated federal law cannot assert that it has and should be protected in a legitimate expectation that the violation will be inexpensive, and the remedy inadequate.

The government's contradictory positions on the merits of this issue have led it to offer inconsistent descriptions of the state of the law in particular circuits. For

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[35]Brief of Appellant Tri-State Mack Distributions, Inc., *Tri-State Mack Distributions, Inc. v. Davis*, No. 92-1123 EALR (8th Cir.), p. 8.

[36]Brief for the United States as Amicus Curiae, *Davis v. Tri-State Mack Distributions*, Nos. 91-3574, 91-1123 (8th Cir.), pp. 8-11.

example, in its briefs in the instant case, the Department of Justice insisted Eleventh Circuit caselaw established a presumption that new laws apply to pre-Act claims, citing three Eleventh Circuit cases.[37] In September 1991, the Department obtained from the Eleventh Circuit in this case a resounding endorsement of that rule and *Bradley*. Five months later, in another case, the Department of Justice insisted there was no clear Eleventh Circuit precedent on this issue:

> Two circuit courts ... have decided cases that they found would have come out the same way under *Georgetown* or *Bradley*, and expressed no preference between them.... *Wright v. Director, FEMA*, 913 F.2d 1566, 1573 (11th Cir. 1990)....[38]

It would be somewhat surprising if none of the Justice

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[37]Brief of Appellee, *United States v. Peppertree Apartments*, No. 89-7850 (11th Cir.), pp. 23, 31 (citing *United States v. Schumann*, 861 F.2d 1234 (11th Cir. 1988); *National Wildlife v. Marsh*, 747 F.2d 616 (11th Cir. 1984); and *United States v. Fernandez-Toledo*, 749 F.2d 703 (11th Cir. 1985)).

[38]Reply Brief for Appellant, *Reynolds v. Martin*, No. 91-15237 (9th Cir.), p. 17 n.6.

Department attorneys who signed or approved this later brief had any knowledge of the decision won earlier by the Justice Department in the instant case. In recent litigation within the Ninth Circuit, the government filed two briefs insisting that that Circuit follows *Bradley*,[39] won in

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[39]Brief for Respondent, *Ayala-Chavez v. I.N.S.*, No. 91-70262 (9th Cir.), p. 19:

> "'A fundamental principle of our jurisprudence is that a court will apply the law as it exists when rendering its decision.' *DeGurules v. I.N.S.*, 833 F.2d 861, 863 [(9th Cir. 1987)] ... *City of Great Falls v. U.S.*, 673 F.2d 1065, 1068 (9th Cir. 1982)."

Memorandum of the United States In Opposition to Defendant's Motion to Dismiss, *United States v. Presidio Investments, Ltd.*, CIV-90-0063-TUC-AM (D. Ariz.), p. 12-13:

> "[T]he United States merely asks this Court to honor the well-established principle that 'a court is to apply the law in effect at the time it renders its decision....' *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). *See also Goida v. Saipan Stevedoring Co.*, 855 F.2d 625, 630-31 (9th Cir. 1988); *DeGurules v. I.N.S.*, 833 F.2d 861, 863 (9th Cir. 1987); *State of Idaho v. Howmat Turbine Co.*, 814 F.2d 1376, 1378 (9th Cir. 1987); *Campbell v. United States*, 809 F.2d 563, 575 (9th Cir. 1987)."

December 1991 a Ninth Circuit endorsement of *Bradley*,[40] and then filed a third brief arguing to the contrary that the Circuit has "expressed no preference between *Bradley* and *Bowen*."[41] Thus within the space of eight months the Department of Justice has filed two briefs in the Ninth Circuit, first expressly approving, and then expressly disapproving, the *Bradley* presumption; the same government attorney is listed as the lead attorney on both of these briefs.[42]

The important inter-circuit conflict described above would be sufficient by itself to warrant a grant of certiorari. Lawyers for the Department of Justice have seized upon the uncertainty in this area of the law to arguing aggressively on

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[40]*Federal Deposit Ins. Corp. v. New Hampshire Insurance Co.*, 1991 U.S. App. LEXIS 30071 (9th Cir. 1991).

[41]Reply Brief for Appellant, *Reynolds v. Martin*, No. 91-15237 (9th Cir.), p. 17 n.6.

[42]This occurred in the Justice Department briefs in *Ayala-Chavez v. I.N.S.* (May 1991; endorsing *Bradley* presumption) and *Reynolds v. Martin* (February 1992; opposing *Bradley* presumption).

both sides of the issue, depending on whether endorsing or repudiating *Bradley* will result in the preferred outcome. Although this litigation tactic may in any given case serve the short term interests of the government, it poses an unreasonable burden on the federal judiciary. Ordinarily the lower federal courts might look to the Department of Justice for principled guidance in a confused and important area of the law. In this instance, however, the inconsistent positions taken by the government in the courts below is necessarily aggravating and exploiting the already serious conflicts among the circuit courts.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

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